

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SEATTLE IRON & METALS)	NO. 62713-9-I
CORPORATION, a Washington)	
corporation,)	DIVISION ONE
Respondent,)	
)	
v.)	
)	
LIN XIE, individually and doing)	UNPUBLISHED OPINION
business as GIANT INTERNATIONAL)	
METAL RESOURCES, and the marital)	FILED: May 10, 2010
community composed of LIN XIE and)	
JANE DOE XIE; LH HIGHTECH)	
CONSULTING LLC, a Washington)	
limited liability corporation,)	
)	
Appellants.)	
)	

Lau, J. — In this letter of credit financed transaction, the rights and obligations under a letter of credit are independent from the rights and obligations on the underlying contract. Here, because Seattle Iron & Metals Corporation's breach of contract claim based on its underlying contract with Lin Xie is independent of its rights as a letter of credit beneficiary and because no material issues of fact exist, the trial court properly granted SIMC's breach of contract summary judgment against Xie. And

we conclude Xie's remaining contentions are without merit. Accordingly, we affirm.

FACTS

Viewed in the light most favorable to Lin Xie, the record shows that in July 2005, Seattle Iron and Metals Corporation (SIMC) and Xie d/b/a Giant International Metal Resources¹ negotiated a scrap metal sale. Under the proposed "purchase contract," SIMC agreed to sell Giant 2,000 metric tons (mt) of shredded scrap metal at \$175 per mt for a total price of \$350,000. The contract stipulated that payment would be "by irrevocable letter of credit payable 100% on sight in favor of the Sellers within three days after signing the contract." Xie drafted, signed and faxed the "purchase contract" to SIMC on July 13. SIMC signed the contract the same day. On August 1, before securing a mutually acceptable line of credit (LOC), the parties signed an amendment to the "purchase contract" that provided, "The sales order total quantity is hereby changed to 1,000 Metric Tons." And Xie also signed a sales order confirming the total sale of 1,000 mt of scrap metal.

Qiangsheng Import N Export Co., Ltd., Xie's end buyer, secured a \$406,000 transferable LOC from Bank of Shanghai in favor of Xie. This transferable LOC lists the applicant as Shanghai Qiangsheng Import N Export and the beneficiary as Giant International Metal Resources. Later, under this transferable LOC, Xie and Wells

¹ Xie did business as "Giant International Metal Resources," but as of September 2008, there had never been an entity registered by that name with the Washington Secretary of State. Xie maintained in deposition testimony that Giant International was the trade name of LH Hightech Consulting, LLC, but that entity was not registered as a limited liability corporation until almost two years after the events leading to this dispute. Accordingly, we refer to Xie and Giant interchangeably.

Fargo Bank transferred to SIMC the right to receive “100% of the invoice value” for shipping

1,000 metric tons of scrap metal to Xie. This transferred LOC for \$175,000 lists Xie as the applicant, Bank of Shanghai as the original issuing bank, Wells Fargo Bank as the issuing bank,² Giant as first beneficiary, and SIMC as second beneficiary.³ And U.S. Bank served as SIMC’s advising bank. By its terms, the transferred LOC expired on September 14, 2005, and required the beneficiary to present specific documents, including a bill of lading, in order to be paid on the LOC.

In late August 2005, SIMC delivered 1,991,710 pounds (900 mt) of scrap metal to the Seattle port and sent billing invoices to Giant for \$158,100.90. Giant shipped 41 of 43 total containers of scrap metal through CU Transport, a freight forwarding company. When the shipment arrived at its destination in China on September 15, 2005, CU Transport provided Xie a bill of lading, which he attempted to present to Wells Fargo⁴ for payment on the transferred LOC. But Wells Fargo “advised that it would not accept the [bill of lading] delivery because it required all of the documents listed in the letter of credit.”⁵ Xie then drove to SIMC and asked Mike Dollard, SIMC’s

² Wells Fargo also served as Bank of Shanghai’s advising bank.

³ Xie and SIMC’s dispute over the LOC designation “beneficiary” and “applicant” is immaterial.

⁴ Wells Fargo also served as the Bank of Shanghai’s local advising bank for the LOC and had the power to accept LOC required documents.

⁵ The LOC required original and copies of the commercial invoice, bills of lading, packing or weight memo for each package, a certified fax from the beneficiary providing shipment details, preshipment inspection certificates, and declaration of nonwooden

chief financial officer, to give him the necessary documents or accompany him to Wells Fargo. Dollard responded that same day by sending the documents directly to U.S. Bank because it held “the original letter of credit at our office,” and Wells Fargo insisted that only U.S. Bank forward the documents.⁶

Meanwhile, Qiangsheng refused to pay Xie for the scrap metal it purchased from SIMC. It eventually paid Xie an amount less than their agreed contract price. In turn, Xie paid SIMC \$60,000 by check as a “partial payment” for the scrap metal and used the remaining funds for legal fees and other costs associated with the transaction.

Procedural History

To recover the balance owed it, SIMC filed a lawsuit in August 2007 against Xie for breach of contract, unjust enrichment, negligent misrepresentation, and fraud. Xie, through counsel, answered and denied most of the allegations and alleged six affirmative defenses: (1) failure to state a claim upon which relief can be granted, (2) failure to plead fraud with particularity, (3) waiver and estoppel, (4) unclean hands, (5) damages were caused by SIMC or third parties and, (6) failure to mitigate damages. Xie did not allege statute of limitations, laches, set-off, or any counterclaims.⁷

Following discovery, SIMC moved for partial summary judgment on its breach of

package.

⁶ In his deposition, Xie was asked, “The actual group of documents . . . Wells Fargo was insisting that they come from U.S. Bank, isn’t that true?” Xie responded, “I believe so.”

⁷ Xie’s amended answer alleged the same six affirmative defenses.

contract and unjust enrichment claims. SIMC also moved for summary judgment dismissal on Xie's affirmative defenses related to SIMC's alleged failure to present LOC documents and to send Qiangsheng Chinese customs documents.⁸ Xie's response argued no contract breach occurred because the purchase contract only obligated him to secure a LOC

and SIMC waived its contractual remedies because it failed to comply with RCW 62A.2-325.⁹

At the summary judgment hearing, the trial court granted summary judgment on the breach of contract claim, but denied the motion in all other respects.

Plaintiff's Motion for Partial Summary Judgment is GRANTED in part. Summary judgment is granted in favor of SIMC on its breach of contract against Xie and his marital community. And it is further

...
ORDERED, ADJUGED AND DECREED that prejudgment interest shall apply to the amounts due to plaintiff as set forth in plaintiff's invoices to defendants.

Summary judgment is denied in all other respects.

Issues regarding the seasonable notification^[1] under letter of credit will be reserved for 30 days and Defendants may note a motion concerning that issue within that time. Enforcement of the judgment is stayed for 30 days.

⁸ Specifically, SIMC moved for dismissal of the estoppel, waiver, unclean hands, and failure to mitigate damages affirmative defenses.

⁹ RCW 62A.2-325(2) governs contract remedies in LOC financed transactions and provides, "The delivery to seller of a proper letter of credit suspends the buyer's obligation to pay. If the letter of credit is dishonored, the seller may on seasonable notification to the buyer require payment directly from him." (Emphasis added.)

¹ Seasonable notification is an RCW 62A.2-325 prerequisite to bringing an action for payment on a contract in an LOC financed transaction.

It also denied Xie's subsequent motion for reconsideration, which argued for the first time that his affirmative defenses should be treated as counterclaims or a set-off. Following supplemental briefing and argument, the court denied Xie's seasonable notification motion based on RCW 62A.2-325. Then in December 2008, it entered a \$139,269.10 judgment against Xie and dismissed SIMC's remaining claims. Shortly after, the court denied Xie's motion to amend his answer to add counterclaims and a set-off.

ANALYSIS

Standard of Review

A motion for summary judgment may be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The burden is on the moving party to show there is no genuine issue of material fact. Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). If the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that material facts are in dispute. Atherton, 115 Wn.2d at 516. But mere allegations and argumentative assertions will not defeat summary judgment. Vacova Co. v. Farrell, 62 Wn. App. 386, 395, 814 P.2d 255 (1991). Summary judgment is proper if, in view of all the evidence, reasonable persons could reach only one conclusion. Vallandigham, 154 Wn.2d at 26. "Summary judgment is appropriate if a contract is unambiguous, even if the parties dispute the legal effect of a

provision.” BP Land & Cattle LLC v. Balcom & Moe, Inc., 121 Wn. App. 251, 254, 86 P.3d 788 (2004). We review a trial court's summary judgment order de novo. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

Independent Breach of Contract Claim

Xie principally contends¹¹ that SIMC's breach of contract claim is improper because it failed to establish three statutory prerequisites under RCW 62A.2-325: (1) SIMC did not properly present LOC documents to Bank of Shanghai, (2) Bank of Shanghai did not dishonor the LOC, and (3) SIMC did not demand payment from Xie. SIMC replies it complied with RCW 62A.2-325 and Xie waived these “defenses” by failing to plead them in his answer.¹²

¹¹ Xie's pro se appeal raises numerous new issues or arguments that were not raised below. For example, he contends (1) he was an agent of SIMC and/or his end-buyer and the contract was really between SIMC and the end-buyer, (2) SIMC was represented by his attorney for purposes of collection, (3) SIMC is not the correct party-in-interest and/or failed to join a necessary party, (4) he did not have a contract with CU Transport, (5) SIMC breached its obligations of good faith and fair dealing, (6) SIMC President Alan Sidell's deposition was improper because it was unsigned and based on hearsay testimony, (7) SIMC is estopped from claiming he was responsible for LOC presentment problems, (8) SIMC's claim is barred by the doctrine of laches, and (9) he never accepted the scrap metal.

Because a party may not raise a new issue or argument on appeal, we confine our review to the issues and arguments properly raised in the trial court. RAP 2.5(a); Smith v. Shannon, 100 Wn.2d 26, 666 P.2d 351(1983). “The purpose of this rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials.” Demelash v. Ross Stores, Inc., 105 Wn. App. 508, 20 P.3d 447 (2001).

¹² SIMC's waiver argument is unpersuasive. A defendant waives affirmative defenses by failing to raise them in an answer, not the right “to controvert the opposing party's prima facie case as determined by applicable substantive law.” See Shinn Irrigation Equip., Inc. v. Marchand, 1 Wn. App. 428, 430–31, 462 P.2d 571 (1969); cf. Harting v. Barton, 101 Wn. App. 954, 960, 6 P.3d 91 (2000) (holding that because defenses of failure to provide notice of default and to submit to mediation did not

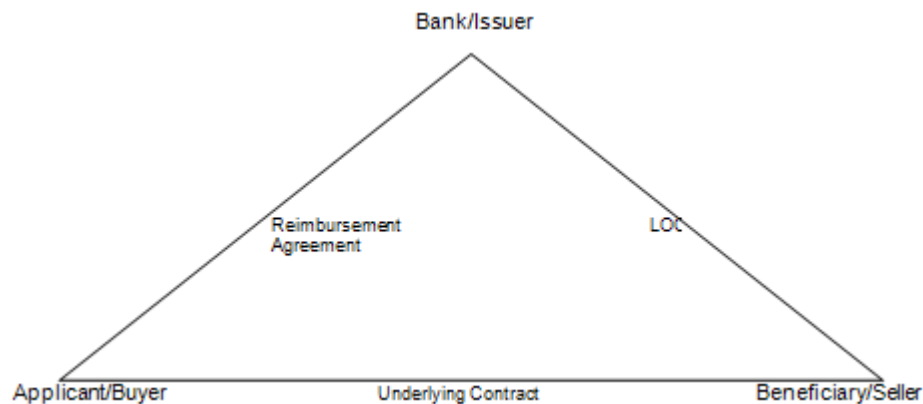
1. Letters of Credit

“Letters of credit are frequently used “to facilitate the financing of commercial transactions between buyers and sellers by providing a certain and reliable means to ensure payment for goods delivered or services rendered.”” Alhadeff v. Meridian on Bainbridge Island, LLC, 167 Wn.2d 601, 611, 220 P.3d 1214 (2009) (quoting Kenney v. Read, 100 Wn. App. 467, 471, 997 P.2d 455 (2000)). LOCs are governed by Uniform Commercial Code, article 5 and are codified in RCW 62A.5-101 through 5-118. Alhadeff, 167 Wn.2d 601. LOC transactions typically involve three parties—the applicant/buyer, the beneficiary/seller, and the bank/issuer—and three distinct relationships.

“(1) the contract between the bank and its customer to issue a letter of credit; (2) the letter of credit in which the issuing bank agrees to pay the beneficiary when the conditions contained in the letter are complied with; and (3) the underlying contract between the customer and the beneficiary for which the letter of credit was obtained.”

Kenney v. Read, 100 Wn. App. 467, 472, 997 P.2d 455 (2000) (quoting Ensco Envtl. Servs. Inc. v. United States, 650 F. Supp. 583, 588 (W.D. Mo. 1986)). The following illustrates this three-party relationship.

controvert a breach of contract claim, they were affirmative defenses that could be waived). SIMC cites only to cases addressing waiver of an affirmative defense, but offers no authority establishing that RCW 62A.2-325 is an affirmative defense.



While the applicant and the issuer generally have an established relationship, the beneficiary may not. Because the beneficiary may be unfamiliar with the issuer and because the issuer may not have any presence where the beneficiary is located, the issuer will often transfer the LOC through a local bank, known as an advising bank.

Where transferable LOCs are at issue, the core principles remain the same, but the actors' roles are different. RCW 62A.5-112 outlines basic transferable LOC requirements. The Uniform Commercial Code comment to that section explains that a transferable LOC means "the beneficiary may convey to a third party its right to draw or demand payment." U.C.C 5-112, cmt. 1. "In international commerce, transferable letters of credit are often issued under circumstances in which a nominated person or adviser is expected to facilitate the transfer from the original beneficiary to a transferee

and to deal with that transferee.” U.C.C. 5-112, cmt. 2. Therefore, a transfer substitutes the transferee for the first beneficiary, “creat[ing] a ‘direct relationship’ between the issuer . . . and the second beneficiary” Banca Del Sempione v. Provident Bank of Maryland, 160 F.3d 992, 995 (4th Cir. 1998). Here, Wells Fargo served as the “nominated person or adviser,” who “facilitate[d] the transfer from [Giant,] the original beneficiary,” to the transferee/second beneficiary, SIMC. U.C.C. 5-112, cmt. 2.

The “independence principle”¹³ “is central to the notion of what constitutes a letter of credit.” 6B William D. Hawkland & Frederick H. Miller, Uniform Commercial Code § 5-103:13 (rev. ed. 2009). “The principle states that the bank’s obligation to the beneficiary is independent of the beneficiary’s performance on the underlying contract.” 3 James J. White & Robert S. Summers, Uniform Commercial Code § 26-2, at 138 (5th ed. 2002). And we have concluded, “The letter of credit itself is independent of the underlying transaction and any other related obligations.” Kenney v. Read, 100 Wn. App. 467, 472, 997 P.2d 455, 4 P.3d 862 (2000). Conversely, the principle also “states that the underlying contract, e.g., a sales or lease contract, between the applicant and the beneficiary, will be viewed as distinct from an overarching contract, i.e., the letter of credit, which is between the applicant’s bank and the beneficiary.” New Orleans Brass,

¹³ The independence principle is codified in RCW 62A.5-103(4). “Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary.”

LLC v. Whitney Nat'l Bank, 818 So.2d 1057, 1060 (La. 2002) (footnote omitted); see also, Alhadeff v. Meridian on Bainbridge Island, LLC, 144 Wn. App. 928, 941, 185 P.3d 1197 (2008) (“the underlying contract is a separate and distinct relationship”), rev'd on other grounds, 167 Wn.2d 601, 220 P.3d 1214 (2009).

Therefore, in an LOC transaction “a party to an underlying contract has a separate cause of action for breach of that contract”¹⁴ Alhadeff, 144 Wn. App. at 940; see also U.C.C § 2-325, cmt 1 (“the furnishing of a letter of credit does not substitute the financing agency's obligation for the buyer's”). But while the Uniform Commercial Code and case law allow for a breach of contract action, a seller must first comply with the provisions of RCW 62A.2-325(1) and (2), which provide that “[f]ailure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale” and “[i]f the letter of credit is dishonored, the seller may on seasonable notification to the buyer require payment directly from him.”

2. Dishonor and Seasonable Notification Under RCW 62A.2-325

Accordingly, our first inquiry is whether SIMC has established dishonor and seasonable notification under RCW 62A.2-325(2). Although no Washington cases

¹⁴ We note that in his summary judgment brief below, Xie acknowledged the application of the “independence principle” to this dispute. To avoid the implications of this principle, he asserted below that “Giant fulfilled its contractual obligation by transferring a letter of credit to SIMCO that SIMCO approved.” Yet on appeal, his reply brief argues “the independence principle . . . does not address claims respecting the underlying contract.” Reply Br. of Appellant at 16. For support, he relies on In re Bradlees Stores, Inc., 313 B.R. 565 (S.D.N.Y. 2004), a New York federal district court bankruptcy case. But reliance on this case is inappropriate. Alhadeff, 167 Wn.2d at 613 (concluding, “The decision of a federal district court in Michigan is emphatically not ‘controlling authority’ in this jurisdiction.”).

have previously addressed dishonor and seasonable notification disputes, case authority from other jurisdictions is persuasive. For example, in CT Chemicals (U.S.A.), Inc. v. Vinmar Impex, Inc., 81 N.Y.2d 174, 613 N.E.2d 159, 177–78, 597 N.Y.S.2d 284 (1993), CT Chemicals sued Vinmar after it shipped goods to Vinmar in an LOC financed transaction and the issuing bank refused to pay on the LOC. The court held that once “the bank formally notified CT that the letter of credit would be dishonored, under

U.C.C 2-325 (2) CT had the right to demand payment from Vinmar, and in fact did so.

Vinmar's refusal to make payment constituted a breach of the contract. . . .” CT

Chemicals, 613 N.E.2d at 163. And in Samsung Am., Inc. v. Yugoslav-Korean Consulting & Trading Co., 248 A.D.2d 290, 291 (N.Y. 1998), Samsung delivered goods to its buyer in Yugoslavia, but the buyer did not pay. On appeal of summary judgment, the buyer argued that Samsung’s failure to properly present LOC documents created an issue of fact. The court rejected this argument, holding,

As long as the bank dishonored the letters [of credit], the reason for dishonor is irrelevant to defendant's obligation to pay for the goods. At most, if they are able to establish that it was plaintiff's fault that the letters were dishonored, defendants may have a claim for damages related to the allegedly wrongful failure to present the documentation.

Samsung, 248 A.D.2d at 291 (citations omitted). We conclude that once a party establishes dishonor and seasonable notification under RCW 62A.2-325, it is entitled to maintain a breach of contract claim. The issue, therefore, is whether Xie presented

evidence that raises a genuine material

issue of fact regarding dishonor and seasonable notification.¹⁵

Here, the record shows that on July 25, 2005, Bank of Shanghai issued a \$406,000 transferable LOC. Later, on August 5, Xie and advising bank, Wells Fargo, transferred to SIMC the right to receive funds for shipping 1,000 metric tons of scrap metal to Giant. This transferred LOC lists the original issuing bank as Bank of Shanghai, the first beneficiary as Giant International Metal Resources, and the second beneficiary as Seattle Iron and Metals Export Corporation. And U.S. Bank served as SIMC's advising bank. Therefore, the transferred LOC "creat[ed] a 'direct relationship' between the issuer [Bank of Shanghai] . . . and the second beneficiary" or transferee, SIMC. Banca Del Sempione, 160 F.3d at 995. While this LOC required SIMC to present documents to Wells Fargo as Bank of Shanghai's advising bank, only the Bank of Shanghai had the authority to honor the LOC.¹⁶

Xie claims that dishonor does not occur unless SIMC "duly presents" the proper LOC documents to the Bank of Shanghai, the bank/issuer. In support of this proposition, Xie cites to the comment to U.C.C. § 2-325.

1. Subsection (2) follows the general policy of this Article and Article 3 (Section 3-802) on conditional payment, under which payment by check or other short-term instrument is not ordinarily final as between the parties if the recipient

¹⁵ Xie also claims that the trial court erred in granting SIMC's partial summary judgment because SIMC raised the RCW 62A.2-325 issues "for the first time" in its summary judgment reply brief. But the undisputed record shows that Xie, not SIMC, raised the RCW 62A.2-325 issues for the first time in his summary judgment response brief.

¹⁶ Xie acknowledges as much stating in his opening brief, "Only Bank of Shanghai as issuer could decide whether to pay or not." Br. of Appellant at 15 n.8.

duly presents the instrument and honor is refused. Thus the furnishing of a letter of credit does not substitute the financing agency's obligation for the buyer's, but the seller must first give the buyer reasonable notice of his intention to demand direct payment from him.

(Emphasis added.) But under Samsung, “As long as the bank dishonored the letters [of credit], the reason for dishonor is irrelevant to defendant's obligation to pay for the goods.” Samsung, 248 A.D.2d at 291 (citing CT Chemicals, 613 N.E.2d at 181). And adopting Xie’s approach would lead to an anomalous result—where the seller performs under the contract but fails to properly present LOC documents, the buyer may retain the goods, leaving the seller with no breach of contract remedy. Xie cites no controlling authority that supports this result, relying instead on the comment to U.C.C. § 2-325 and RCW 62A.3-501(b)(3).¹⁷ But the Uniform Commercial Code provision applicable here, “‘Dishonor’ of a letter of credit,”¹⁸ contains no similar due presentment requirement. And Xie’s reliance on RCW 62A.3-501(b)(3) is erroneous because that article applies only to negotiable instruments. LOCs are not negotiable instruments. See RCW 62A.3-102; Williams v. Sandman, 187 F.3d 379, (4th Cir. 1999) (analyzing LOCs under South

¹⁷ That section provides,

“Without dishonoring the instrument, the party to whom presentment is made may (i) return the instrument for lack of a necessary indorsement, or (ii) refuse payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or rule.”

¹⁸ See RCW 62A.5-102(1)(e). “‘Dishonor’ of a letter of credit means failure timely to honor or to take an interim action, such as acceptance of a draft, that may be required by the letter of credit.” And “‘Honor’ of a letter of credit means performance of the issuer’s undertaking under in the letter of credit to pay or deliver an item of value.” RCW 62A.5-102(h).

Carolina and Virginia's codification of the Uniform Commercial Code). Furthermore, whether SIMC duly presented the proper documents is not material. As Xie correctly acknowledged in his third-party complaint against CU Transport, "By the time [Xie] received the B/L [bill of lading], it is already late for the 15 day presentation requirement of the Letter of Credit."¹⁹ Thus, Xie's "due presentment" argument fails.

When viewed in the light most favorable to Xie, the record supports only one reasonable conclusion—the Bank of Shanghai dishonored the LOC. First, a November 2005 demand letter from Xie's former attorney to SIMC states, "The originating bank, Bank of Shanghai, and its local agent, Wells Fargo, have refused to pay on the letter of credit issued by Bank of Shanghai." The December 2005 letter written by Xie's attorney to Wells Fargo states, "We have requested that the Bank of Shanghai reconsider its October 12, 2005 refusal to honor the letter of credit." Xie's summary judgment response acknowledged, "The Bank of Shanghai eventually refused to pay under the letter of credit" And in his brief to this court, Xie wrote, "The Bank of Shanghai repudiated the LOC payment." Br. of Appellant at 15. Finally, Xie presented no evidence that raises a genuine material issue of fact about whether the Bank of Shanghai dishonored the LOC.

Xie next argues that SIMC is not entitled to recover payment from him because it failed to give him seasonable notification of its payment demand. Under

¹⁹ And the undisputed record establishes that the scrap metal shipment arrived at its destination port on September 15, 2005, one day after the LOC expired.

RCW 62A.1-204(3), “[a]n action is taken ‘seasonably’ when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.” Because the parties never agreed to a notification deadline, SIMC must provide notice within a reasonable time. “What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.” RCW 62A.1-204(2). Finally, “[a] person has ‘notice’ of a fact when . . . from all the facts and circumstances known to him or her at the time in question he or she has reason to know that it exists.” RCW 62A.1-201(25)(c). Xie’s argument fails because the undisputed record shows that SIMC timely demanded payment from Xie. First, SIMC sent Giant invoices totaling \$158,100.90 on August 23 and 29, 2005—the same day it shipped the scrap metal. Then on November 29, 2005, Xie wrote to SIMC explaining,

We are going to issue you some partial payment we received from the End customer. Please acknowledge the payment of \$60,000 when [you] receive it. We are working hard to get the full payment from Bank of Shanghai as soon as possible. We are looking forward to doing more business with you once fund is cleared.

. . . .

Please also sign and fax back this page to us.

We, Seattle Iron and Metal Corp, will refund Giant International Metal Resources any amount received over the original invoice value. We understand that your lawyer is working on getting the full payment from QiangShen and Bank of America.

Signature

Mike Dollard

SIMC replied on December 13, 2005.

It is our understanding that your intent is to provide \$60,000 as partial payment toward our invoices D42527 and D42616 which total \$158,100.90. We understand you are attempting to collect the remaining portion of these invoices

from your customer.

We confirm that we are due \$158,100.90 relating to this transaction and if Seattle Iron Metals Corp. inadvertently receives from Giant International Metal Resources, any amount over this figure, we will refund the excess to Giant International Metal Resources.”

We will notify you upon receipt of the partial payment.

Finally, on December 20, Xie sent SIMC a \$60,000 check as “partial payment.”

Notably, Xie provided no declaration establishing that he did not know SIMC demanded payment. And our review of the record reveals no evidence to support his assertion.²

Based on this record, reasonable persons could reach only one conclusion—SIMC timely demanded payment from Xie as required under RCW 62A.2-325. Vallandigham, 154 Wn.2d at 26.

Statute of Limitations

Xie next argues that RCW 62A.5-115’s one-year statute of limitations²¹ bars SIMC’s breach of contract claim. Xie did not raise this argument below and under RAP 2.5(a), we “may refuse to review any claim of error which was not raised in the trial court.” Xie contends, however, that under New Meadows Holding Co. v. Wash. Water Power Co., 102 Wn.2d 495, 498, 687 P.2d 212 (1984), “this [waiver] rule does not

² We decline to consider Xie’s declaration submitted with his appellate brief because it fails to conform with RAP 9.1(a).

²¹ RCW 62A.5-115 provides, “An action to enforce a right or obligation arising under this Article must be commenced within one year after the expiration date of the relevant letter of credit or one year after the cause of action accrues, whichever occurs later. A cause of action accrues when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the breach.”

apply when the question raised affects the right to maintain the action.” But New Meadows is inapposite. That case involved a party who challenged the applicability of a statute of limitations for the first time on appeal, but a party with identical interests had made the argument at summary judgment. New Meadows, 102 Wn.2d at 497–98. The court held that waiver did not apply because the statute of limitations involved the party’s right to maintain the action and the trial court had the opportunity to rule on the issue. New Meadows, 102 Wn.2d at 498–99; see also Bogle & Gates, P.L.L.C. v. Holly Mountain Res., 108 Wn. App. 557, 562–63, 32 P.3d 1002 (2001). Here, the New Meadows exception does not apply because the trial court never considered the RCW 62A.5-115 statute of limitations since no party raised the issue below. Bogle & Gates, 108 Wn. App. at 563. Accordingly, Xie waived the statute of limitations argument by not raising it below.

Contract Terms

Finally, Xie makes several arguments that center on purported disputes over the quantity of scrap metal to be shipped under the purchase contract. But these arguments are meritless.

Xie first asserts that the parties’ original July 11, 2005 contract obligated SIMC to ship 2,000 metric tons of scrap metal. But the undisputed record shows that SIMC and Xie signed an August 1, 2005 amendment changing the total quantity of scrap metal to be shipped from 2,000 to 1,000 metric tons.

This Letter is an amendment to our sales order number 4740 dated July 7, 2005.

- The sales order total quantity is hereby changed to 1,000 Metric Tons

- An irrevocable Letter of Credit, executed and acceptable to Seattle Iron and Metals Corp. must be delivered by our bank to us no later than Friday, August 5, 2005.
- You must provide documentation supporting that your customer is BaoSteel.

I accept this amendment reflected as Seattle Iron and Metals Corp. sales order 4784, an executed copy of which is attached, and acknowledge that Seattle Iron and Metals Corp sales order 4740 is hereby attached

. . . .
I have read the above and am in agreement with the terms contained thereon.

And while the transferable LOC provided for 2,000 mt of scrap metal, the transferred LOC issued just four days after the above contract amendment, described the covered goods:

Description of Goods &/or Services
STEEL SCRAP (ISRI CODE 211)
QUANTITY: 1000MT
UNIT PRICE: USD175.00/MT
PRICE TERM: CFR SHANGHAI, CHINA

(Emphasis added.) Thus, Xie's contentions about the quantity of scrap metal to be shipped are undermined by the transferred LOC terms and the amended agreement he signed. And Xie also failed to plead counterclaims or set-off based on breach of SIMC's alleged obligation to ship 2,000 metric tons rather than 1,000 metric tons.

Motion to Amend Answer

Xie also challenges the trial court's denial of his motion to file an amended answer to allege counterclaims and set-off. Under RAP 5.1(f), "If a party wants to seek review of a trial court decision entered pursuant to rule 7.2 after review in the same case has been accepted by the appellate

court, the party must initiate a separate review of the decision by timely filing a notice of appeal or notice for discretionary review.” Here, the trial court denied Xie’s motion on February 11, 2009, more than a week after we accepted review on February 3.²² And Xie has not “initiate[d] a separate review of the decision by timely filing a notice of appeal or notice for discretionary review.”

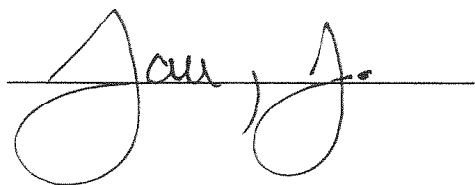
RAP 5.1(f). Accordingly, the issue is not properly before us. Notation Ruling, Xie v. Seattle Iron & Metals Corp., No. 62713-9-I (Wash. Ct. App. Feb. 3, 2009).

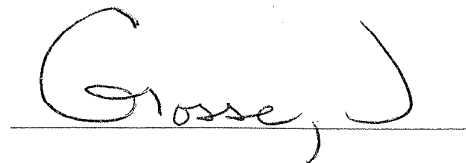
We affirm.



WE

CONCUR:





²² And the undisputed record shows that on January 20, 2009, Xie moved pro se to amend his answer after the trial court entered final judgment on December 9, 2008. The trial court properly exercised its discretion by denying this motion.